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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

Jeremiah W. (Jay) Nixon, Attorney General of Missouri, and John Maupin, Chairman, Missouri Ethics Commission, *Petitioners*,

v.

Shrink Missouri Government PAC, a political action committee, W. Bevis Schock and Fredrick T. Dyer, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case is a companion to *Carver v. Nixon*, No. 95-1258 (cert. pending), which also arose from challenges to Missouri's 1994 reform of its campaign finance laws. *Carver* deals with the rights of those who make contributions to campaigns. The first question in this case deals with the use of funds once they are contributed:

1. Whether the First Amendment gives candidates an unfettered right, once they accept contributions during a campaign for one office, to decline to use those funds to speak during that campaign, so as to preclude a state from requiring that candidates return unused funds to contributors.

The second question deals with candidates' overall campaign expenditures:

2. Whether the First Amendment precludes a state from differentiating, in terms of its disclosure requirements and its restrictions on the contributions by corporations, labor unions, and other non-individuals, between candidates who commit themselves to keep total campaign expenditures within defined limits and those who refuse to make that commitment.

PARTIES TO THE PROCEEDING

The parties in this suit are Jeremiah W. (Jay) Nixon, Attorney General of Missouri; John Maupin, Chairman of the Missouri Ethics Commission; Shrink Missouri Government PAC, a political action committee; W. Bevis Schock and Frederick T. Dyer.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Jeremiah W. (Jay) Nixon, Attorney General of Missouri, and John Maupin, Chairman of the Missouri Ethics Commission, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App.") at A-1 - A-16) is reported at 71 F.3d 1422. The opinion of the district court (App. at A-17 - A-40) is reported at 892 F. Supp. 1246.

JURISDICTION

The court of appeals entered its judgment on December 19, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States and Sections 130.052, 130.053 and 130.130 of the Revised Statutes of Missouri (App. at A-41 - A-46).

STATEMENT

While addressing Congressional efforts to reform the campaign finance system, this Court in *Buckley v. Valeo*[1] observed that "safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion" must be the primary focus of any campaign finance reform. The claims that candidates have been able to "buy" 1996 presidential primary election victories highlight the continuing need to find innovative methods of safeguarding the integrity of elections. In this case, the court of appeals halted two such innovations, and did so with sweeping conclusions that will preclude further innovations in the very areas of campaign reform where recent events have raised the greatest concerns.

Efforts to reduce the influence of money in politics have been undertaken regularly since the turn of the

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[1] 424 U.S. 1, 58 (1976).

century.[2] Early reform efforts were limited to restricting contributions to candidates from corporations, labor unions, and government employees.[3] Due to the inadequacy of those efforts, particularly demonstrated by the serious abuses arising out of the 1972 presidential elections, Congress and many state legislatures enacted broader reforms. The reform movement began with the federal disclosure requirements, contribution limits, and absolute expenditure limits that this Court reviewed in *Buckley*.

The reforms of the early 1970's did not eliminate the public's perception of corruption or its increasing scepticism concerning electoral and legislative politics. The increased cynicism of the 1990's has brought about a new wave of campaign finance reforms, both by the legislatures and by the people through initiative petition and public vote. In 1994, Missouri undertook reform through both methods. Senate Bill (S.B.) 650 enacted some reforms, including the imposition of limits on contributions to candidates, the creation of voluntary expenditure ceilings, and the enactment of restrictions on the carrying over of political "war chests" from campaign to campaign. Proposition A, an initiative petition passed by a vote of 74% of the citizens of Missouri, contained its own "war chest" provision, as well as the contribution limits that are at issue in *Carver v. Nixon*.

On May 8, 1995, the three respondents filed this suit challenging the constitutionality of several of these reform measures. "Shrink Missouri Government PAC" is a political action committee that contributes to campaigns of

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[2] *See United States v. Auto Workers*, 352 U.S. 567, 575 (1957).

[3] *See id.* at 575-587.

candidates for Missouri offices; W. Bevis Schock and Fredrick Dyer claim that they are candidates for office. They brought this suit against two state officials: John Maupin, Chairman of the Missouri Ethics Commission, and Attorney General Jeremiah W. (Jay) Nixon. On July 7, 1995, the district court issued an order and judgment holding that certain provisions of Missouri's campaign finance law violated the First Amendment rights of the respondents, and entered a permanent injunction against their enforcement.[4] On December 19, 1995, the U.S. Court of Appeals for the Eighth Circuit affirmed the decision of the district court.[5]

Petitioners now seek review of the court of appeals' decisions regarding the state's voluntary expenditure ceilings and its law on carrying forward contributions from one election to another. The court of appeals held that Missouri had compelling state interests for enacting these laws, including its interest in preventing corruption and the appearance of corruption in the campaign process.[6] However, the court found an insufficient nexus between those compelling interests and the means that the General Assembly and the electorate used to address them.[7] It did so with language that was so broad that it will stifle further efforts to attack the problems of the huge increases in campaign expenditures and the carrying over of campaign "war chests" -- an act that inhibits, rather than promotes, political speech.

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[4] App. at A-17.

[5] App. at A-1.

[6] App. at A-9.

[7] App. at A-10.

REASONS FOR GRANTING THE WRIT

I. The states and Congress are inhibited in their efforts to reform campaign finance by the Eighth Circuit's determination that the First Amendment prevents them from differentiating between candidates who are willing to commit themselves to keeping their overall expenditures within reasonable levels and those who are not.

Twenty years ago, in *Buckley*, this Court rejected Congress' decision to place absolute, involuntary dollar limits on expenditures by individual candidates seeking public office.[8] At the same time, this Court affirmed the use of an incentive (in that instance, the allocation of public financing) for voluntary restrictions on overall campaign expenditures.[9] This Court did not opine as to what other, less expensive incentives would be permissible. It certainly did not address the ability of Congress or the states, when requiring campaign finance disclosures or regulating the sources from which contributions could be accepted, to differentiate between those who are willing to keep their expenditures within reasonable limits, and those who are not. In its holding, the Court left enough room for innovation -- but also enough room for the Eighth Circuit to stifle innovation.

Missouri's voluntary expenditure ceilings are one innovative attempt to follow the overall plan endorsed by this Court in *Buckley* (provide incentives rather than impose limits), without slavishly adhering to the federal, public financing model. All candidates for Missouri elected office

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[8] 424 U.S. at 54-57.

[9] *Id.* at 85-108.

must, at the time of declaring their candidacy, file a declaration indicating whether they agree to abide by the limits.[10] The expenditure limits vary according to the office sought, and this initial declaration is wholly voluntary. The state thereafter differentiates in two key respects between the two groups of candidates -- those who make the commitment of reasonableness, and those who do not.

Missouri first differentiates between these two groups by using the oldest of the methods of attacking corruption in politics: restricting the sources of campaign contributions. A candidate who subscribes to the expenditure ceilings (a "subscribing candidate") may accept contributions from all sources, including individuals, corporations, labor unions and political parties. On the other hand, a candidate who elects not to subscribe to these expenditure limits (a "nonsubscribing candidate") may only accept contributions from individuals, and not from political action committees ("PACs"), political parties, unions, corporations, etc.[11]

Restrictions on the sources of campaign contributions are common to many state laws, and to federal law.[12] For example, Connecticut's law restricts contributions to candidates from business entities.[13] Other states prohibit independent expenditures by certain business

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[10] § 130.052.1, Rev. Stat. Mo. (Supp. 1995).

[11] § 130.052.3, Rev. Stat. Mo. (Supp. 1995).

[12] 2 U.S.C. § 441b (1976) (limits contributions or expenditures by banks, corporations and labor organizations).

[13] Conn. Gen. Stat. Ann. § 9-333o (1995).

entities, either against or in support of candidates.[14] Current campaign reform efforts in the states include such restrictions. For example, just last week the Kansas Senate passed a bill that would allow candidates to accept contributions only from individuals and political committees.[15] There are myriad variations on this theme.

Restricting contributions by corporations and other entities is commonplace, and does not pose a constitutional infringement of the First Amendment. Thus, this Court upheld such a restriction in *Austin v. Michigan Chamber of Commerce*.[16] Missouri's law is not extraordinary in terms of the restriction it imposes. But in rejecting that law because of the way in which it differentiates among candidates, the Eighth Circuit has issued a declaration that prevents the states from making any distinction between subscribing and nonsubscribing candidates.

The second area in which Missouri has created a distinction is one with even wider acceptance. This Court in *Buckley* expressly endorsed the use of disclosure requirements.[17] Missouri has long had such requirements. The 1994 change was, again, to create a distinction between campaigns where expenditures are kept within under reasonable ceiling, and those that go beyond that point. Under §§ 130.041 and 130.046, all candidates make their

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[14] *E.g.*, La. Rev. Stat. Ann. § 1505.2 (West 1996).

[15] Kansas Senate Bill 545 (passed Senate March 13, 1996).

[16] 494 U.S. 652 (1990).

[17] 424 U.S. at 66-67.

last pre-election reports seven days before the election, reflecting contributions and expenditures as of ten days before the election.[18] But if a nonsubscribing candidate's expenditures exceed the defined ceilings, then -- and only then -- that candidate must begin filing daily reports.[19]

This district court and court of appeals failed to recognize that this part of the Missouri program is a *disclosure* statute. This Court has observed that disclosure

> allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interest to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.[20]

Disclosure requirements are "the least restrictive means of curbing the evils of campaign ignorance and corruption."[21] Yet the court of appeals has precluded the states from enacting statutes that use this "least restrictive means" as the basis for an incentive to keep campaign expenditures under control.

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[18] All candidates must report last-minute large contributions (now precluded by Missouri's contribution limits). § 130.051, Rev. Stat. Mo. (1994).

[19] § 130.052.3, Rev. Stat. Mo. (Supp. 1995).

[20] *Buckley*, 424 U.S. at 66-67.

[21] *Id.* at 68.

Although the precise approach chosen by Missouri is innovative, the great majority of states have some kind of expenditure ceilings already in place. Some impose only minimal limitations, including prohibiting candidates for state elected office from spending campaign contributions on particular items, and restricting cash expenditures above specified amounts.[22] Other states go a step further. These states offer an incentive to candidates to encourage them to comply with campaign expenditure limits. Most of these states utilize the only incentive the Eighth Circuit would allow: public financing.[23] But even those statutes vary

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[22] Colo. Rev. Stat. § 1-45-112 (1995) (limits certain cash expenditures to $100); Conn. Gen. Stat. Ann. § 9-333o (1995) (limits business contributions and independent expenditures) and § 9-333j (1995) (sets out list of permissible campaign expenditures); Del. Code Ann. 15 § 8020 (1995) (lists "authorized campaign expenditures"); N.M. Stat. Ann. § 1-19-29.1 (1995) (restricts expenditure of campaign funds to specified uses); La. Rev. Stat. Ann. § 18:1505.2 (West 1996) (prohibits certain cash expenditures in excess of $100; also prohibits some independent expenditures by corporations, unions, etc.); S.C. Code Ann. § 8-13-1332 (Law Co-op. 1993) (makes certain types of expenditures unlawful); and Wash. Rev. Code Ann § 42.17.070 (1996) (restricts cash expenditures to $50 under certain circumstances; also restricts which individuals may make campaign expenditures on behalf of a candidate or political committee).

[23] *E.g.*, Id. Code § 34-2502 (1995) (creates election campaign fund); N.J. Rev. Stat. Ann. § 19:44A-35 (West 1996) (limits expenditures from state fund for election campaign expenses); and Wis. Stat. Ann. § 11.50 (West 1995) (creates state election campaign fund).

considerably. For example, some states, like Florida, only apply their ceilings to certain candidates.[24]

Thus Missouri's enactment of voluntary expenditure ceilings is part of a trend that is spreading throughout the country. Those seeking to reform campaign laws in other states now look to the court of appeals' decision in this case, which apparently holds that there can be no voluntary expenditure ceiling unless public financing is the incentive for compliance.[25] In the view of the Eighth Circuit, that is true regardless of the state's compelling interests in enacting the limits, regardless of how narrowly tailored the law is drawn to serve those interests, and regardless of whether the incentives consist of regulations that this Court has said are permissible, such as prohibitions on corporate contributions and the imposition of strict disclosure requirements.

To focus myopically on the presence of public financing in some state and the federal statutes is to ignore the other incentives they contain. Those statutes also

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[24] Fla. Stat. Ann. § 106.34 (1996) (applies ceilings only for candidates for Governor, Lieutenant Governor and Cabinet officer positions). *See also, e.g.*, Tex. Elec. Code Ann. § 253.160, *et seq.* (Vernon 1996) (limits expenditures by judicial candidates); N.C. Gen. Stat. § 163-278.48 (1995) (limits apply only to candidates for Governor); Me. Rev. Stat. Ann. 21 § 1015 (1995) (expenditure limits for state senators and state representatives only); N.H. Rev. Stat. Ann. § 664:5-b (1994) (limits apply to both several state and federal office seekers); and Ky. Rev. Stat. Ann. § 121A.030(1) (Baldwin 1996) (limits apply only to candidates for Governor and Lieutenant Governor).

[25] App. at A-9.

provide for penalties to be imposed on candidates who exceed expenditure limits after they have pledged to abide by them. For example, Nebraska's law requires candidates who exceed the limits by less than five percent to return the public funds they have received.[26] Nebraska also imposes a criminal penalty; if the subscribing candidate exceeds the limits by five percent or more, then that candidate is guilty of a Class II misdemeanor.[27] Many other states, such as Maryland and Michigan, also provide for criminal penalties.[28]

Other variations on voluntary expenditure ceiling laws are found in Hawaii,[29] Kentucky,[30] Massachusetts,[31]

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[26] Neb. Rev. Stat. § 32-1607(2) (West 1996).

[27] Neb. Rev. Stat. § 32-1607(3) (West 1996).

[28] *E.g.*, Md. Elec. Code Ann. § 31-3(c) (1995) (candidate and committee chair/treasurer held jointly and severally liable both civilly and criminally); and Mich. Comp. Laws Ann. § 169.267(3) (West 1996) (candidate guilty of a misdemeanor punishable by fine up to $1,000 or up to ninety days in jail).

[29] Haw. Rev. Stat. § 11-209 (1995).

[30] Ky. Rev. Stat. Ann § 121A.030 (Baldwin 1996).

[31] Mass. Gen. Laws Ann. 55A § 1A (1996).

Minnesota,[32] Texas[33] and Vermont.[34] In Hawaii, candidates who receive public funding are subject to expenditure limits, and are strictly penalized for exceeding those limits.[35] Subscribing candidates who exceed the limits must notify their opponents, their contributors, the election officer and the election commission both by telephone and in writing the same day the expenditure limits are exceeded.[36] This notification requirement is considerably more onerous than the disclosure requirements in Missouri's law that were struck down by the court of appeals.[37]

Kentucky's expenditures limitations law, which was recently upheld by a federal district court,[38] conditions receipt of public funding for candidates for Governor and Lieutenant Governor on the candidates' agreement to abide by the expenditure limits.[39] Both subscribing and

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[32] Minn. Stat. Ann. § 10A.25 (West 1996).

[33] Tex. Elec. Code Ann. § 253.160 (Vernon 1996).

[34] Vt. Stat. Ann. 17 § 2841 (1994).

[35] Haw. Rev. Stat. § 11-209(b) (1995).

[36] Haw. Rev. Stat. § 11-209(b) (1995).

[37] § 130.052.3, Rev. Stat. Mo. (Supp. 1995); *see* App. at A-42.

[38] *Wilkinson v. Jones*, 876 F. Supp. 916 (W.D. Ky. 1995) (state may limit total campaign expenditures for publicly funded candidates).

[39] Ky. Rev. Stat. Ann. § 121A.030(1) (Baldwin 1996).

nonsubscribing candidates can receive up to twenty-five percent of their contributions in any one election from permanent committees.[40] But just as in Missouri, limits on contributions to Kentucky candidates vary in part according to whether those candidates choose to subscribe to the expenditure ceilings. For nonsubscribing candidates, total contributions may not exceed $150,000; subscribing candidates, however, may accept contributions in excess of $150,000.[41]

Massachusetts' law functions much like Kentucky's. All candidates for Massachusetts statewide offices must file statements indicating whether they agree to abide by the state's expenditure limits;[42] in order to receive public financing, a candidate must abide by the limits.[43] If candidates fail to file this statement, then their names do not appear on the ballot.[44] If a candidate does not agree to the expenditure limits but his or her opponents do, then that nonsubscribing candidate must file a statement indicating the maximum amount of expenditures to be made in his or her campaign.[45] Again, a candidate's failure to file this

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[40] Ky. Rev. Stat. Ann. § 121A.030(4) (Baldwin 1996).

[41] Ky. Rev. Stat. Ann. § 121A.030(4) (Baldwin 1996).

[42] Mass. Gen. Laws Ann. 55A § 1A(a) (1996).

[43] Mass. Gen. Laws Ann. 55A § 6 (1996).

[44] Mass. Gen. Laws Ann. 55A § 1A(a)(2) (1996).

[45] Mass. Gen. Laws Ann. 55A § 1A(b) (1996).

statement will result in that candidate's name not appearing on the ballot.[46]

Other states impose different expenditure limits depending on the office sought. The laws in Minnesota and Vermont, for example, mandate different expenditure limits for different elected offices, as well as different limits for the same office depending on the particular candidate seeking that office.[47] Minnesota's expenditure ceiling law is somewhat more complex, and arguably more restrictive, than Missouri's law. In Missouri, all candidates for the same office are subject to the same expenditure limits, if they pledge to abide by those limits.[48] In Minnesota, the expenditure limits are higher for those candidates who have never before run for office.[49] If a candidate agrees to the limits and thereby becomes eligible for a public subsidy, but then exceeds those limits, that candidate may be fined in an amount up to four times the amount by which the expenditures limit was exceeded.[50] However, if that candidate's opponent does not agree to limit his or her expenditures, then the subscribing candidate is no longer bound by the limits, is still eligible for a public subsidy, and also receives his or her opponent's share of the public

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[46] Mass. Gen. Laws Ann. 55A § 1A(b) (1996).

[47] Vt. Stat. Ann. 17 § 2841 (1994); Minn. Stat. Ann. § 10A.25 (1996).

[48] § 130.052.1, Rev. Stat. Mo. (Supp. 1995).

[49] Minn. Stat. Ann. § 10A.25, Subd. 2(c) (West 1996).

[50] Minn. Stat. Ann. § 10A.25, Subd. 1 (West 1996).

subsidy.[51] These consequences could be considered "burdens" to candidates who do not subscribe to the limits, and Minnesota is bound by the decisions of the Eighth Circuit Court of Appeals. The court of appeals decision appears to undercut Minnesota's law.

Laws are also in jeopardy in Vermont and Texas. Vermont subjects incumbents and challengers to different expenditure limits.[52] A challenger candidate who agrees to the limits may spend up to 110 percent of the amount spent by the incumbent.[53] A candidate's agreement to abide by the limits does not lead to any public funding. Rather, that initial decision merely gives rise to a series of consequences, both beneficial and nonbeneficial. If a candidate agrees to the limits, then his or her name appears on a list prepared by the Secretary of State of subscribing candidates.[54] If the candidate then exceeds those limits, he or she is subject to both civil and criminal penalties.[55] But under the court of appeal's holding, Vermont's statute may be in jeopardy because it does not contain the sole appropriate "benefit" or "incentive," namely, public funding.

Texas' law is also in jeopardy. In Texas, all candidates for judicial office must file a statement indicating whether they will abide by the state's expenditure

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[51] Minn. Stat. Ann. § 10A.25, Subd. 10(b) (West 1996).

[52] Vt. Stat. Ann. 17 § 2842(c) (1994).

[53] Vt. Stat. Ann. 17 § 2842(c) (1994).

[54] Vt. Stat. Ann. 17 § 2841(c) (1994).

[55] Vt. Stat. Ann. 17 § 2806(b) (1994).

limits.[56] Until a candidate files this statement, however, he or she may not accept contributions or make any campaign expenditures.[57] Like Vermont's law and Missouri's law, that initial declaration is wholly voluntary and does not trigger public funding.[58]

Unfortunately, the court of appeals' opinion may encourage Texas, Vermont and other states to repeal their current voluntary expenditure ceilings, or prevent them from enacting new limits. Indeed, several states' legislatures have already repealed expenditure ceiling laws.[59] Many did so undoubtedly as a result of this Court's decision in *Buckley*, incorrectly believing, as did the Eight Circuit, that this Court in *Buckley* determined the validity of all campaign expenditure ceilings. This is evidenced by the legislative history behind Alaska's repealed limits. The historical notes to Alaska's annotated statutes indicate that

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[56] Tex. Elec. Code Ann. § 253.164(a) (Vernon 1996).

[57] Tex. Elec. Code Ann. § 253.164(c) (Vernon 1996).

[58] Tex. Elec. Code Ann. § 253.164 (Vernon 1996).

[59] *Eg.*, Alaska Stat. §§ 15.13.070(f) and (g), repealed by SLA 1986, ch. 85, § 45; Del. Code Ann. 15 §§ 8007-8009, repealed by 67 Del. Laws, ch. 449, § 1, effective Jan. 1, 1991; R.I. Gen. Laws § 17-25-6, repealed by PL 1981, ch. 188, § 3; and S.D. Cod. Laws § 12-25-7, repealed by SL 1976, ch. 109, § 8.

Alaska's expenditure limits were not enforced because they were believed to violate the *Buckley* holding.[60]

The chilling effect of this Court's discussion of expenditure ceilings in *Buckley* is easily explained. This Court had before it only two extreme forms of expenditure ceiling: an absolute limit, which it rejected; and a voluntary limit tied to expensive public financing, which it sustained. The Court could only have dealt in dicta with variations of more moderate cost and effect; it appropriately chose not to speculate as to the constitutionality of incentives other than public funds. Until now, legislatures may have felt constrained, but they were not precluded from trying alternatives. The Eighth Circuit's decision does not chill legislative action; it freezes it.

Unless this Court now acts to consider whether there is some constitutionally permissible middle ground, all efforts by common citizens to reform campaign funding laws will be doomed in the absence of significant taxpayer obligations. This Court should tell the states, Congress, and those citizens agitating for reform whether the Eight Circuit correctly read *Buckley* to preclude the innovation of non-financial incentives to abide by voluntary expenditure ceilings, or whether there is still reason to believe that something -- anything -- other than a public funding incentive is constitutionally permissible.

II. In rejecting Missouri's carryover provision, the Eighth Circuit has found a right of candidates to determine unilaterally what they may do with contributors' funds, has elevated that right over the interest of the state and the people in full and

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[60] *See* Historical Notes to Alaska Stat. § 15.13.070.

robust political debate, and has both threatened existing campaign laws and inhibited future campaign finance reforms -- all without any guidance from this Court.

This Court has recognized that a principal purpose of the First Amendment is to promote an "uninhibited, robust, and wide-open" debate on public issues.[61] To that end, the overwhelming majority of the states have enacted laws limiting the use of campaign contributions for purposes other than such debate, by placing time and spending restrictions on candidates' use of campaign funds. Missouri has added just one restriction to that set of laws: a requirement that candidates use, rather than carry over to some possible future campaign, the money that contributors give them to speak.

The court of appeals, like the United States District Court for the Eastern District of California in its review of a similar California provision,[62] held that such limitations are unconstitutional, purportedly under the holding of *Buckley v. Valeo*.[63] Neither court was able to point to anything on point in *Buckley*, for this Court has never held that candidates have a right to take contributors' funds and then refuse to use them to speak. Both courts ignored the fact that these limitations are far more similar in their workings and effect on speech to

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[61] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

[62] *See Service Employees International Union v. Fair Political Practices Commission*, 721 F. Supp. 1172 (E.D. Cal. 1989).

[63] *See ibid.* at 1175-1179.

the type of contribution limits that this Court has upheld[64] than they are to the type of unconstitutional spending limits that the Court struck down in *Buckley*. Both courts' decisions are inconsistent with this Court's earlier denial of certiorari to review a similar Florida statute.[65] And although the decision of one district court has not had a significant impact on the progress of campaign finance reform, the decision of the Eighth Circuit will.

The Eighth Circuit decision in this case is particularly troublesome if its decision in *Carver v. Nixon* is allowed to stand. In *Carver*, the Eighth Circuit abandoned this Court's references to contributions constituting "speech by proxy"[66] and its declaration in *Buckley* that contribution limits have little effect on contributors' free speech rights because it is the act of contributing, not the amount of the contribution, that constitutes speech.[67] Instead, the Eighth Circuit declared that a contributor is speaking indirectly during the campaign, *i.e.*, that the candidate's speech is, in essence, the speech of the contributor for First Amendment purposes. Then, the Eighth Circuit in this case abandoned the idea that

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[64] *See, e.g., Buckley*, 424 U.S. at 29.

[65] *See Ferre v. Florida*, 481 U.S. 1037 (1987) (declining to review decision of Florida court decisions, upholding constitutionality of a statute that prohibits candidates from accepting contributions after a certain period of time following an election, in *Ferre v. State*, 494 So.2d 214 (Fla. 1986), and *Ferre v. State*, 478 So.2d 1077 (Fla. Dist. Ct. App. 1985)).

[66] *California Medical Association v. Federal Election Commission*, 453 U.S. 182, 195-97 (1981).

[67] 424 U.S. at 20-21.

contributors are speaking and took the inconsistent position that candidates have an unfettered right to accept the contributors' money, but then *not* to use it to speak. In fact, the Eighth Circuit has held that a candidate has a constitutional right to take money from contributors who support her in one race against one opponent, then to use that money in another race against another candidate -- regardless of which candidate the contributor may support in that other race! That holding is necessarily premised on the conclusion that once the candidate receives the money, it is no longer a symbol of speech. It is necessarily premised on the conclusion that once funds are contributed, they become the sole property of the candidate, to use as she wishes.

The latter conclusion affects laws in 34 of the 50 states and the District of Columbia.[68] Those jurisdictions

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[68] For examples of laws restricting the use, or timing of use, of campaign contributions by candidates, other than Missouri's, *see*: Ala. Code §§ 36-25-6 (b)-(d) and 17-22A-7(a) (1995); Ariz. Rev. Stat. Ann. §§ 16-905G and 16-915.01 (1995); Ark. Stat. Ann. § 7-6-203(I)(2) and (j)(1)-(3) (1995); Cal. Elec. Code § 20300 (West 1996); Colo. Rev. Stat. § 1-45-117 (1995); Conn. Gen. Stat. Ann. §§ 9-333i(g), 9-333j(e) and 9-333r (1995); Del. Code Ann. 15 §§ 8020 and 8022 (1995); D.C. Code Ann. § 1-1472 (1995); Fla. Stat. Ann. § 106.141 (West 1995); Ga. Code Ann. § 21-5-33 (Harrison 1995); Haw. Rev. Stat. §§ 11-200 and 11-206 (1995); Ill. Ann. Stat. ch. 10, para. 5/9-5 (Smith-Hurd 1995); Ind. Code Ann. §§ 3-9-1-12, 3-9-2-9 and 3-9-3-4 (West 1996); Iowa Code Ann. §§ 56.41 and 56.42 (West 1995); Kan. Stat. Ann. § 25-4157a (1994); Ky. Rev. Stat. Ann. § 121.180(10) (Baldwin 1996); La. Rev. Stat. Ann. § 1505.2.I. (West 1996); Me. Rev. Stat. Ann. 21-A § 1017.8 (1995); Md. Elec. Code Ann. § 26-7(d) (1995); Mich. Comp. Laws Ann. § 169.245 (West 1996);

contemplate that contributors' dollars are to be placed in a kind of trust status -- a status that is entirely inconsistent with, and thus threatened by, the Eighth Circuit's decision.

A few years ago, the respondents might have cried out that the restrictions imposed in other states bore no relationship to Missouri's determination that contributed funds must either be used or returned to the contributors. But that is no longer true. Since the United States District Court for the Eastern District of California reached its decision in 1989, at least 18 states have enacted laws that, like California's carryover provisions, directly affect the ability of candidates to use contributions accepted in one campaign to fight the battle of another.[69] Missouri's law is just one example. It requires candidates to dispose of any unspent campaign funds, less outstanding amounts owed for campaign expenses incurred prior to election day, within a certain

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Minn. Stat. Ann. § 10A.25, Subd. 11 (West 1996); Nev. Rev. Stat. § 294A.160 (1993); N.J. Rev. Stat. Ann. § 19:44A-11.2 (West 1996); N.M. Stat. Ann. § 1-19-29.1 (1995); Ohio Rev. Code Ann. §§ 3517.109 and 3517.13 (Baldwin 1995); Okla. Stat. Ann. 51 § 316 (West 1996); R.I. Gen. Laws § 17-25-7.2 (1994); S.C. Code Ann. §§ 8-13-1370, 8-13-1340, 8-13-1352 and 8-13-1350 (Law Co-op. 1993); Tenn. Code Ann. § 2-10-114 (1995); Tex. Elec. Code Ann. § 254.204 (Vernon 1996); Va. Code Ann. § 24.2-921 (1994); Wash. Rev. Code Ann. § 42.17.095 (1996); Wis. Stat. Ann. §§ 11.16(4), 11.19(1) and 11.25(2) (West 1995).

[69] § 130.130, Rev. Stat. Mo. (Supp. 1995). The other states are Arkansas, California, Colorado, Connecticut, Iowa, Kansas, Kentucky, Maine, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee and Virginia. *See* footnote 68, supra.

period of time after the election is concluded; nine other states have similar requirements.[70] In Missouri, candidates may dispose of such excess funds by returning them to contributors or donating them to the state. Approximately 28 other states with carryover provisions permit candidates to return funds to contributors,[71] and approximately 18 of those states permit donation of the excess funds to the state.[72]

Missouri's carryover provision does not provide some of the options for disposal of excess funds that other states provide. For example, some states permit successful candidates to use left-over contributed funds to pay for inaugural festivities, or to defray transition or other expenses associated with the office for which they have successfully run.[73] Still other states permit candidates to make donations

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[70] These states are Arkansas, Connecticut, the District of Columbia, Florida, Maine, Ohio, Oklahoma, Tennessee and Texas. *See* footnote 68, supra.

[71] Not all of these states require return within a certain time limit. The states permitting return are Arizona, Arkansas, California, Connecticut, the District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington and Wisconsin. *See* footnote 68, supra.

[72] Again, not all such states establish a time frame: Alabama, Arkansas, Florida, Georgia, Indiana, Iowa, Kentucky, Maine, Maryland, Minnesota, New Mexico, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Washington and Wisconsin. *See* footnote 68, supra.

[73] Examples are Alabama, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii,

to charities and other not-for-profit organizations.[74] Because it lacks such provisions, and thus is more closely tied to contributors' interests and the question of contributors' speech, Missouri's carryover provision is an ideal statute for review by this Court. Although it is marked by features common to many of the states' laws, it is simple and straightforward enough to permit this Court to provide the guidance that the states need as they struggle to preserve the integrity of the election process. . .

By granting the writ and hearing this case, this Court will be able to provide needed guidance concerning the constitutionality of statutes, found in the overwhelming majority of the states[75] that prohibit candidates from

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Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, New Jersey, New Mexico, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington and Wisconsin. *See* footnote 68, *supra*.

[74] This is the case in the following states: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, New Jersey, New Mexico, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Washington and Wisconsin. *See* footnote 68, *supra*.

[75] While some states only explicitly address the use of excess contributions after an election, others contain an explicit ban on personal use of contributions at any time during the elections process. *See* Ala. Code §§ 36-25-6(d) and 17-22A-7(a) (1995); Ariz. Stat. Ann. § 7-6-203(I)(2) and (j)(3) (1995); Cal. Elec. Code § 89512.5 (West 1996); Colo. Rev. Stat. § 1-45-117(1) (1995); Conn. Gen. Stat. Ann. § 9-333i(g)(4) (1995); Del. Code Ann. 15 § 8020

converting contributors' funds to personal use at any time, either prior to or after the election. The universal acceptance of such provisions has never been sanctioned by this Court -- nor could it easily be sanctioned, were this Court to affirm that candidates have the kind of unfettered rights to that money that the Eight Circuit has found is constitutionally mandated. At minimum, the Eighth Circuit decision calls into question the constitutionality of myriad state statutes that restrict a candidate's ability to use campaign funds for future campaigns[76] or to transfer such

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(1995); Fla. Stat. Ann. § 106.141(5) (West 1995); Ga. Code Ann. § 21-5-33(a) and (c)(Harrison 1995); Haw. Rev. Stat. § 11-206 (1995); Ill. Ann. Stat. ch. 10, para. 5/9-5 (Smith-Hurd 1995); Ind. Code Ann. § 3-9-2-9 (West 1996); Iowa Code Ann. § 56.41.1 (West 1995); Kan. Stat. Ann. § 25-4157a(a) (1994); La. Rev. Stat. Ann. § 1505.2.I. (West 1996); Nev. Rev. Stat. § 294A.160 (1993); N.H. Rev. Stat. Ann. § 664:4-b (1994); N.J. Rev. Stat. Ann. § 19:44A-11.2 (West 1996); N.M. Stat. Ann. § 1-19-29.1 (1995); N.Y. Elec. Law § 14-130 (McKinney 1996); Ohio Rev. Code Ann. § 3517.13(O) (Baldwin 1995); Okla. Stat. Ann. 15 § 316 (West 1996); R.I. Gen. Laws § 17-25-7.2 (1994); S.C. Code Ann. § 8-13-1370 (Law. Co-op. 1993); Tenn. Code Ann. § 2-10-114(b) (1995); Tex. Elec. Code Ann. §§ 253.038 and 253.035 (Vernon 1996); Vt. Stat. Ann. 17 § 2804 (1994); Va. Code Ann. § 24.2-921 (1994); Wash. Rev. Code Ann. § 42.17.125 (1996); Wis. Stat. Ann. § 11.25(2) (West 1995).

[76] At least 14 statutes prohibit such use, including Ark. Stat. Ann. § 7-6-203(j)(1) (1995); Conn. Gen. Stat. Ann. § 9-333j(e)(1)(A) (1995); Del. Code Ann. 15 § 8020 (1995); D.C. Code Ann. § 1-1472 (1995); Fla. Stat. Ann. § 106.141 (West 1995); Haw. Rev. Stat. § 11-200 (1995); Kan. Stat. Ann. § 25-4157a (1994); Ky.

funds to other candidates[77] or political groups.[78] The Eighth Circuit decision thus invites litigation in all fifty states. The answers to the questions posed in those cases are not given in any of this Court's prior precedents. Review of this case would provide some general guidance concerning the extent of a candidate's right to use funds contributed by others that would give the states and their citizens some guideposts to follow.

Rev. Stat. Ann. § 121.180(10) (Baldwin 1996); Me. Rev. Stat. Ann. 21-A § 1017.8 (1995); Md. Elec. Code Ann. § 26-7(d) (1995); N.M. Stat. Ann. § 1-19-29.1 (1995); Ohio Rev. Code Ann. § 3517.109(B) (Baldwin 1995); S.C. Code Ann. §§ 8-13-1370, 8-13-1352 and 8-13-1350 (Law. Co-op 1993); Wash. Rev. Code Ann. § 42.17.095 (1996).

[77] Statutes containing this type of limitation include Cal. Elec. Code § 85304 (West 1996); Conn. Gen. Stat. Ann. § 9-333r(a) (1995); D.C. Code Ann. § 1-1472 (1995); Haw. Rev. Stat. § 11-200 (1995); Ill. Ann. Stat. ch. 10, para. 5/9-5 (Smith-Hurd 1995); Iowa Code Ann. § 56.42 (West 1995); Kan. Stat. Ann. § 25-4157a (1994); Ky. Rev. Stat. Ann. § 121.180(10) (Baldwin 1996); Md. Elec. Code Ann. § 26-7(d) (1995); Mich. Comp. Laws Ann. § 169.245 (West 1996); Minn. Stat. Ann. § 10A.25 Subd. 11 (West 1996); N.M. Stat. Ann. § 1-19-29.1 (1995); S.C. Code Ann. § 8-13-1340 (Law Co-op. 1993); Wash. Rev. Code Ann. § 42.17.095 (1996).

[78] *See. e.g.* Cal. Elec. Code §§ 89510, 89512.5, 85304 (West 1996); Conn. Gen. Stat. Ann. § 9-333r(a) (1995); Ill. Ann. Stat. ch. 10, para. 5/9-5 (Smith-Hurd 1995); N.M. Stat. Ann. § 1-19-29.1 (1995); Wash. Code Ann. § 42.17.095 (1996).

III. The court of appeals' evidentiary requirement will have broad adverse implications for states attempting to address any compelling state interest, whether or not related to elections or campaign finance reform, because it cannot be met where there are no formal legislative histories or where a law is enacted by initiative.

In rendering its decision in this case, as in *Carver v. Nixon*, the court of appeals established a new standard of review for certain types of statutes challenged on First Amendment grounds. The court repeated throughout its opinion that it "disagreed" with the State of Missouri's conclusions that the campaign finance measures at issue in the case were narrowly tailored to address compelling state interests and that the "state ha[d] failed to meet its burden."[79] At no point in the decision did the court discuss the voluminous evidence submitted by the State of Missouri to demonstrate that the provisions are narrowly tailored to address several compelling state interests, including the prevention of the appearance of corruption. More important for the future, at no point did Eighth Circuit indicate what kind of evidence -- if any -- could meet the undefined standard it imposed.

By drawing its own conclusions irrespective of the evidence introduced by the State of Missouri, the court of appeals has established a precedent which will make it difficult, if not impossible, for states that do not record legislative history or that do permit their voters to enact laws through the initiative process to defend the constitutionality of their campaign reform laws. Without saying so explicitly, the court of appeals affirmed and

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[79] *See* App. at A-9 and similar statements at A-10, A-14, A-15 and A-16.

endorsed the district court's view that "[a]lthough defendants have argued a number of potential justifications for the laws at issue here, they have not provided any evidence that either the state legislature or the electorate actually considered those justifications in enacting Senate Bill 650 or Proposition A."[80]

The courts below ignored an essential fact of legislative enactments in the states: the absence of the kind the extensive legislative findings and history that often characterize Congressional acts. For example, Missouri's General Assembly, like the legislative bodies in most states, does not keep any type of formal legislative proceedings other than journals recording the transfer of bills and other matters from one chamber to another, transfers of bills to and from committees, and the progress of deliberations and amendments on the floor of each chamber. This journal does not contain minutes of statements in support of or in opposition to bills. Legislators are not required to incorporate a clause into each bill outlining the purpose for enacting the bill or the legislative findings leading to the bill's enactment, and the legislators do not ordinarily include such clauses. Committee meetings and hearings and not generally recorded. Thus, in most cases in Missouri and other states with similar practices, providing a court with evidence of the legislative history supporting

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[80] App. at A-22. The district court recognized that it might be impossible for the State of Missouri to adduce legislative history or "findings" in this case, and claimed to give the state "the benefit of the doubt" concerning the reasons for the passage of the laws. App. at A-22. No such benefit of the doubt appears to have been given when reviewing the state's evidence that the laws are narrowly tailored to serve the admittedly compelling state interests, however.

a particular law is a matter of piecing together any written materials which legislative staff members may have retained following the law's enactment, gathering statements from any knowledgeable witnesses to committee deliberations and looking at the facts which were known and obvious to the legislators at the time the law was under consideration.

While providing evidence to support an act of the state legislature may be difficult, proving the "initiative history" for measures adopted through the initiative process is virtually impossible. Before a statewide initiative measure may be placed on the ballot, petitions containing the text of the proposed statute must be signed by a certain number of registered voters.[81] Aside from the text of the proposed measure, the petitions contain a ballot title of no more than 100 words that is drafted by the Secretary of State and summarizes the measure's provisions in a neutral fashion.[82] The text of the proposed measure does not have to, and does not usually, identify the purpose of the measure. Thus, nothing in the formal initiative process creates a record of the findings or goals of either the proponents or circulators of the measure, or of the citizens who vote for its passage. In fact, it is inappropriate to include extraneous material, such as graphs, charts, and other presentations of data -- the very material that presumably the Eighth Circuit would require, were it to actually specify what evidentiary burden it was imposing.[83]

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[81] Article III, § 50, *Constitution of the State of Missouri* (1945).

[82] § 116.334.1, Rev. Stat. Mo. (1994).

[83] *See Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 22-23 (Mo. 1981) (Rendlen, J., dissenting).

Missouri courts have reflected this Court's scepticism about legislative history and committee "findings."[84] It would be truly ironic to permit the courts of appeals to now condemn statutes in Missouri and elsewhere for not including in legislative history, committee reports, and bills or initiative petitions some sort of self-serving "findings" to support the action they contemplate. This Court in *Buckley* relied not on express, specific Congressional findings. Instead it relied largely on the plain language of the Constitution and the statutes, on common knowledge, on logic, and on policies leading to honest government. The Eighth Circuit's attempt to lead the courts away from the example set in *Buckley* and toward some unidentified and unworkable evidentiary goal demands the attention of this Court.

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[84] *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989); *Gershman Investment Corp. v. Duckett Creek Sewer District*, 851 S.W.2d 765, 768-769 (Mo. Ct. App. 1993); *Hastings v. Van Black*, 831 S.W.2d 214, 215-215 (Mo. Ct. App. 1992); *Risk Control Associates, Inc. v. Melahn*, 822 S.W.2d 531, 535 (Mo. Ct. App. 1991), *reh'g. transfer denied*.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

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